(4)

No. 06-88

RECEIVED
AUG 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the
Supreme Court of the United States

BAYER CORPORATION, and WYETH,
Petitioners,

v.

JAMES E. ANDERSON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

CHARLES K. WIGGINS, WSBA 6948
Counsel of Record
WIGGINS & MASTERS, P.L.L.C.
SHELBY R. FROST LEMMEL, WSBA 33099
241 MADISON AVENUE NORTH
BAINBRIDGE ISLAND, WA 98110
(206) 780-5033

TIMOTHY M. O'BRIEN, FL BAR 055565
LEVIN PAPANTONIO THOMAS
MITCHELL ECHSNER & PROCTOR, P.A.
P.O. BOX 12308
PENSACOLA, FL 31591
(850) 435-7000
Counsel for Respondents

Becker Gallagher Legal Publishing, Inc. 800.890.5001

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are as follows:

Bayer Corporation and Wyeth, *Petitioners*

James E. Anderson, James Anderson, Jr., John R. Anderson, Jack Archer, Dorothy Bailey Banks, Louis Bailey and Barbara Bailey, Sheila Barkley, Kathy Bradham, Eddie Butler, Ethel Carter, Ernestine Dale and M.J. Dale, Elizabeth Elmore, Daisy Harris, Leeida Henard, Robert Hendry, Dollas Jacob and Eugene Jacob, Ollie L. King, William C. Magee and Rosie Magee, Belain Merrick, Glenn Maier and Paula Maier, Sharon Twyner McKinney, Valerie Mitchell, Melanie Netterville and Charles Netterville, Veronica Nickelson, Elizabeth Pritchard, Edward Schuette, Levi Smith, Sr. and Marjorie Smith, Willie Thompson and Mae Thompson, Alfanette Vaughn, Della Warren, Lois Washington, Shawanda Washington, Charles Welch, Patricia Wells, Martha Wicks, Nathaniel Williams and Bobbie Williams, Roger Dale Wilson and Wilma Diane Wilson, Delores Woods, Robert Green, Lillian Pace, Joy Pickering and Judd Pickering, James Lang and Mildred Marshall, *Respondents*

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

Bayer Corporation, Wyeth, GlaxoSmithKline Consumer Healthcare, L.P., SmithKline Beecham Corporation d/b/a GlaxosmithKine, Block Drug Co., Inc., Block Drug Corporation, Bristol Myers Squibb, Proctor & Gamble Pharmaceuticals, Inc., Novartis Consumer Health, Inc, and Novartis Pharmaceuticals Corporation, McNeil-PPC, Inc., Wal-Mart Stores, Amerisource Bergan, Rite-Aid, Walco Oil, Super D Drugs Acquisition, Wal-Mart Stores East, Liberty Drug Store, and K & B Services, Inc., *Appellees*

All Respondents here are Appellants below.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RESPONSE TO STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION FOR CERTIORARI 5

A. The Court should deny the Petition for Writ of Certiorari because the Ninth Circuit did not address the issue of which the Petitioners seek review. 5

B. The Ninth Circuit's decision does not conflict with decisions from the Fifth and Eleventh Circuits 7

1. The Ninth Circuit's decision does not reject Tapscott 7

2. The Ninth Circuit's decision is distinguishable from Tapscott on grounds very similar to those the Eleventh Circuit enunciated shortly after deciding Tapscott 9

3. The Fifth Circuit does not add to the "split" that the Petitioners allege 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Anderson v. Bayer Corp.,
#04-35875, Unpub. Op at 2 (9th Cir. 2006) 1

Baker v. Dorfman,
239 F.3d 415 (2nd Cir. 2000) 5

In re Benjamin Moore & Co.,
318 F.3d 626 (5th Cir. 2002) 1, 7, 10

Burnette v. Dresser Indus. Inc.,
849 F.2d 1277 (10th Cir. 1988) 6

Bustamante-Barrera v. Gonzales,
447 F.3d 388 (5th Cir. 2006) 5

Cal. Dump Truck Owners Ass'n v. Cummins Engine Co., Inc.,
24 F. App'x. 727 (9th Cir. 2001) 8, 10

DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden,
448 F.3d 918 (6th Cir. 2006) 5

District of Columbia v. Air Florida, Inc.,
750 F.2d 1077 (D.C. Cir. 1984) 6

Gardiner v. Virgin Island Water & Power Auth.,
145 F.3d 635 (3rd Cir. 1989) 6

Ghebremedhin v. Ashcroft,
392 F.3d 241 (7th Cir. 2004) 5

Harick v. Cal. Teachers Ass'n,
326 F.3d 1042 (9th Cir.) 5, 6

Muth v. United States,
1 F.3d 246 (4th Cir. 1993) 5

Olsen v. United States,
414 F.3d 144 (1st Cir. 2005) 5

Sheffield v. Aceves,
540 U.S. 965, 124 S.Ct. 429,
157 L.Ed.2d. 309 (2003) 5

Tanner Adver. Group, L.L.C. v. Fayette County,
451 F.3d 777 (11th Cir. 2006) 5

Tapscott v. MS Dealer Serv. Corp.,
77 F.3d 1353 (11th Cir. 1996) . . . . . *passim*

Taylor v. Freeland & Kronz,
503 U.S. 638, 112 S.Ct. 1644,
118 L.Ed.2d 280 (1992) 5

Taylor v. Southwestern Bell Telegraph Co.,
251 F.3d 735 (8th Cir. 2001) 5

Triggs v. John Crump Toyota,
154 F.3d 1284 (11th Cir. 1998) 7, 9

Youakim v. Miller,
425 U.S. 231, 234, 96 S.Ct. 1399,
47 L.Ed.2d 701 (1976) 5

RESPONSE TO STATEMENT OF THE CASE

This case does not present the "important question" of which the defendants seek certiorari. Pet. for Cert. at 2. In an unpublished memorandum decision, the Ninth Circuit held that the Defendants failed to prove that resident defendants were fraudulently joined, where the Defendants did not establish that the Anderson Plaintiffs' joint complaint "obviously fails to state a cause of action under Mississippi law against resident defendants." ***Anderson v. Bayer Corp.***, #04-35875, Unpub. Op at 2 (9th Cir. 2006) (Petition for Writ of Certiorari App. A). This Court should not grant certiorari to evaluate the product liability law of Mississippi. The Ninth Circuit declined to sever the claims of the Anderson Plaintiffs who named non-diverse defendants, stating "[n]o basis appears in the record or in our case law" for doing so. Pet. for Cert. App. A.

The Ninth Circuit's refusal to sever claims against non-diverse defendants is the basis of the core complaint in the Petition for Writ of Certiorari. Based on decisions from the Fifth and Eleventh Circuits, the Petitioners argue that severance is required because misjoinder of plaintiffs amounts to fraudulent joinder. But the Petitioners waived any misjoinder argument because they failed to raise it in the District Court. The Ninth Circuit did not address misjoinder, or the case law with which the Petitioners claim a conflict.

Since the Ninth Circuit did not issue a holding on misjoinder, this case could not and does not conflict with ***In re Benjamin Moore & Co.***, 318 F.3d 626 (5th Cir. 2002) or ***Tapscott v. MS Dealer Serv. Corp.***, 77 F.3d 1353 (11th Cir. 1996). Pet. for Cert. App. A. Rather, nothing in this unpublished memorandum decision would prevent the Ninth Circuit from, in a future case, severing misjoined plaintiffs from properly joined plaintiffs, where the misjoinder destroyed complete diversity – assuming of course that misjoinder was actually pled and proved.

The following briefly summarizes the procedural history relevant to the Petition for Writ of Certiorari. The Anderson Plaintiffs – 47 parties injured after taking cold medications containing PPA, joined by 11 spouses – filed this action on December 27, 2003, in a state court in Mississippi. All of the Anderson Plaintiffs are Mississippi residents. The Defendants include non-resident manufacturers and distributors of the medications containing Phenylpropanolamine ("PPA"), and both resident and non-resident retailers who sold the defective products to the Plaintiffs. Nine Anderson Plaintiffs brought claims against non-resident manufacturers and resident retailers.

The Defendants removed the case in March 2003, claiming fraudulent joinder of resident defendants and misjoinder of plaintiffs. Pet. for Cert., App. F at 46a & 48a. The Anderson Plaintiffs moved to remand, but before any ruling, the case was transferred to MDL 1407, ***In re Phenylpropanolamine (PPA) Products Liability Litigation***. The Anderson Plaintiffs renewed their motion to remand on February 13, 2004. In opposition, the Defendants argued that the resident defendants were fraudulently joined – they did not argue that plaintiffs were misjoined. The Defendants attached to their opposition their earlier response to the motion to remand filed in Mississippi District Court, which also argued only fraudulent joinder of resident defendants, not misjoinder of plaintiffs.

On May 5, 2004, the District Court denied remand on the ground that the Anderson Plaintiffs fraudulently joined resident defendants, where they "failed to state a cause of action against the [resident] defendants, and that the failure is obvious according to the settled rules of Mississippi and Louisiana." The District Court did not address misjoinder – as above – the Defendants had not raised it.

The District Court dismissed the Anderson Plaintiffs' claims with prejudice under a Court Management Order

("CMO") and the Anderson Plaintiffs appealed from the dismissal and challenged the District Court's diversity jurisdiction. The Anderson Plaintiffs argued that the District Court lacked jurisdiction because the complaint stated valid claims under Mississippi law against resident defendants, thereby destroying diversity. The Defendants maintained that resident defendants were fraudulently joined under Mississippi law, but the Ninth Circuit disagreed, holding that joinder was proper, and that the District Court thus lacked diversity jurisdiction. The Ninth Circuit noted that the defendants had failed to present any evidence that resident retailer defendants had no knowledge of the dangers of PPA (Pet. for Cert. App. A) as they could have done under Mississippi law.

The Defendants also argued that the resolution of the District Court's diversity jurisdiction affected only the Anderson Plaintiffs who raised claims against resident defendants. They claimed that the Plaintiffs who sued resident defendants were misjoined with Plaintiffs who sued only diverse defendants and that the Plaintiffs had failed to dispute a District Court order holding them misjoined. Pet. for Cert. at 5. The Defendants' Brief of Appellee did not specify the District Court order that allegedly held the Anderson Plaintiffs misjoined, and since the issue was not raised, the District court never issued such an order in the Anderson consolidated case.

The Petitioners now suggest that CMO 15 conclusively establishes the misjoinder of the Anderson Plaintiffs. Pet. for Cert. at 4-5. CMO 15 is an administrative order in which the District Court severed cases already in the MDL, and ordered all plaintiffs in multi-plaintiff claims pending in the MDL to file new individual Complaints. Of course, there was no specific ruling on the Anderson Complaint, as this case had not yet been transferred into the MDL when the District Court issued CMO 15.

In any event, the Anderson Plaintiffs replied that the Defendants could not argue misjoinder of plaintiffs because they neglected to raise the argument in the District Court. As discussed above, when the Defendants responded to the Anderson Plaintiffs' motion to remand, they did not raise misjoinder. Nor did they suggest – as they incorrectly claim here – that CMO 15 had already resolved that the Anderson Plaintiffs' claims were misjoined.

During oral argument, the Defendants were expressly asked whether they had raised misjoinder of plaintiffs "below." They referred only the Notice of Removal filed in District Court of Mississippi, which was not in the excerpts of record before the Ninth Circuit.

After the Ninth Circuit issued its decision, the Defendants moved to supplement the Excerpts of Record (see Ninth Cir. Rules 10-2 and 30-1) to add their Notice of Removal, and petitioned for rehearing *en banc*, based solely on the alleged misjoinder of plaintiffs. The sole source of their Complaint is the following single sentence in the Ninth Circuit's decision:

> No basis appears in the record or in our case law for severing the claims of the eight plaintiffs who have named non-diverse defendants.

Pet. for Cert. App. A. The Anderson Plaintiffs, permitted to respond only to the motion to supplement the ER, argued that the Notice of Removal – the only document in which the Defendants argued misjoinder of plaintiffs – is irrelevant because the Defendants did not raise misjoinder of plaintiffs in their response to the motion for remand, or in any other capacity to the District Court. The Ninth Circuit denied both the motion to supplement the ER and the petition for rehearing *en banc*.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

A. The Court should deny the Petition for Writ of Certiorari because the Ninth Circuit did not address the issue of which the Petitioners seek review.

The Petition for Certiorari assumes that Anderson Plaintiffs were misjoined, and based on that incorrect assumption, claims that the Ninth Circuit erred in refusing to hold that the allegedly misjoined Plaintiffs were fraudulently joined. But the Ninth Circuit did not address misjoinder, and thus could not, and did not issue a holding on whether misjoinder amounts to fraudulent joinder. This Court should not grant certiorari over an issue that the Ninth Circuit did not decide. ***Taylor v. Freeland & Kronz***, 503 U.S. 638, 645-46, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992) ("'ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]'") (quoting ***Youakim v. Miller***, 425 U.S. 231, 234, 96 S. Ct. 1399, 47 L. Ed. 2d 701 (1976) (*per curiam*)).

The Ninth Circuit does not consider issues that have not been raised in the District Court. ***Harick v. Cal. Teachers Ass'n***, 326 F.3d 1042, 1052 (9th Cir.) *cert. denied sub nom.* ***Sheffield v. Aceves***, 540 U.S. 965, 124 S.Ct. 429, 157 L.Ed.2d. 309 (2003). There is no "split in the Circuits" (Pet. for Cert. at 10) on this point. Neither this Court, nor any of the Circuit courts consider issues raised for the first time on appeal. ***Taylor***, 503 U.S. at 645-46; ***Bustamante-Barrera v. Gonzales***, 447 F.3d 388, 392 n.10 (5th Cir. 2006); ***DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden***, 448 F.3d 918, 922 (6th Cir. 2006); ***Tanner Adver. Group, L.L.C. v. Fayette County***, 451 F.3d 777, 787 (11th Cir. 2006); ***Olsen v. United States***, 414 F.3d 144, 154 (1st Cir. 2005); ***Ghebremedhin v. Ashcroft***, 392 F.3d 241, 243 (7th Cir. 2004); ***Taylor v. Southwestern Bell Tel. Co.***, 251 F.3d 735, 740 (8th Cir. 2001); ***Baker v. Dorfman***, 239 F.3d 415, 420 (2nd Cir. 2000); ***Muth v. United States***, 1 F.3d 246, 250

(4th Cir. 1993); ***Gardiner v. Virgin Island Water & Power Auth.***, 145 F.3d 635, 646-47 (3rd Cir. 1989); ***Burnette v. Dresser Indus. Inc.***, 849 F.2d 1277, 1282 (10th Cir. 1988); ***District of Columbia v. Air Florida, Inc.***, 750 F.2d 1077, 1085 (D.C. Cir. 1984).

The Defendants did not raise misjoinder in the District Court and therefore waived the issue. ***Harick***, 326 F.3d at 1052. The Ninth Circuit did not address misjoinder, or whether misjoinder amounts to fraudulent joinder. Pet. for Cert. App. A. As such, the question presented in the Petition for Certiorari is fatally flawed, where it incorrectly assumes that Plaintiffs were misjoined. Pet. for Cert. at i.

The question presented in the Petition for Certiorari is whether misjoinder can amount to fraudulent joinder, such that a party's citizenship should be disregarded to determine diversity jurisdiction. Pet. for Cert. at i. The Petitioners claim that the Ninth Circuit's decision is in conflict with ***Tapscott*** (*supra*), which held that sufficiently egregious misjoinder is fraudulent joinder. Pet. For Cert. at 6, 7. But a finding of misjoinder – in fact, "egregious" misjoinder – is a predicate to the application of ***Tapscott***. Since the Ninth Circuit did not hold that parties were misjoined (much less egregiously misjoined), it did not and could not issue a holding accepting or rejecting ***Tapscott***.

Further, the Petitioners neglect to mention that they did not as much as mention ***Tapscott*** in the Brief of Appellee. Rather, it was not until after the Ninth Circuit issued its decision, that they raised ***Tapscott*** for the first time in their petition for rehearing *en banc*.

The Ninth Circuit simply did not address the issue of which the Petitioners seek review. Thus, this case does not present the issue raised, and it is an inappropriate vehicle to address whether the fraudulent joinder doctrine should extend to misjoined plaintiffs. The Court should deny certiorari.

B. The Ninth Circuit's decision does not conflict with decisions from the Fifth and Eleventh Circuits.

As discussed above, the Ninth Circuit did not address the issues presented in the Petition for Certiorari and this Court should deny certiorari. Even assuming that a single sentence in the Ninth Circuit's decision impliedly holds that plaintiffs were misjoined, albeit not fraudulently, the decision is not at odds with ***Tapscott***. There is no "split in the Circuits" and the Court should deny certiorari. Pet. for Cert. at 10.

The Petitioners argue that the Ninth Circuit's decision "directly conflicts" (Pet. for Cert. at 7) with ***Tapscott*** (11th Cir.) and ***Benjamin Moore*** (5th Cir.), "creating a split in the Circuits." *Id.* at 10. The rule of law articulated in ***Tapscott*** is that misjoinder of plaintiffs can be so "egregious" that it is fraudulent and merits disregarding the citizenship of the party who destroys diversity. ***Tapscott***, 77 F.3d at 1360. The Eleventh Circuit subsequently distinguished ***Tapscott*** on the ground that it involved "two distinct classes that have 'no real connection' to each other," joined into one class action. ***Triggs v. John Crump Toyota***, 154 F.3d 1284, 1289 (11th Cir. 1998). Contrary to the Petitioners' claim, the Ninth Circuit's decision is not inconsistent with the Eleventh Circuit's decision in ***Tapscott*** – it is factually distinguishable from ***Tapscott*** – and consistent with ***Triggs***.

1. The Ninth Circuit's decision does not reject *Tapscott*.

Tapscott involved two different class actions – the "automobile class" and the "merchant class" – joined together in one case. 77 F.3d at 1355. In the second class action including the merchant class, the sole defendant, Lowe's, was clearly diverse as to the named plaintiffs. Lowe's removed the case, and the district court found misjoinder, severed the two classes, remanding the automobile class to state court but retaining jurisdiction as to the merchant class action.

The Eleventh Circuit held that "[m]isjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action." 77 F.3d at 1360. Although Tapscott had colorable claims against the resident defendants in the automobile class, the resident defendants in the automobile class had no real connection with events giving rise to the putative merchant class action. *Id.* Rather, the facts giving rise to the automobile class's claims were "wholly distinct" from the facts giving rise to the merchant class's claims. *Id.* Thus, while "mere misjoinder" is not fraudulent joinder such that the court can ignore the citizenship of a party, egregious misjoinder may amount to fraudulent joinder. *Id.*

Contrary to the Petitioners' claim, there is nothing in the Ninth Circuit's decision even suggesting that it disagrees with ***Tapscott***, much less that it "flatly rejected the [***Tapscott***] doctrine." Pet. for Cert. at 11. The Petitioners neglect to mention that the Ninth Circuit's decision does not cite, discuss, or even mention ***Tapscott***. *Id.* As discussed above, the Petitioners did not even raise ***Tapscott*** until after the Ninth Circuit issued its decision.

The only Ninth Circuit decision addressing ***Tapscott*** – or whether egregious misjoinder is fraudulent – is an unpublished decision that turns on the egregiousness requirement. ***Cal. Dump Truck Owners Ass'n v. Cummins Engine Co., Inc.***, 24 F. App'x. 727, 730 (9th Cir. 2001) (cited at Pet. For. Cert. at 11). There, "[f]or purposes of discussion," the Ninth Circuit "assume[d], without deciding," that it would adopt the ***Tapscott*** doctrine that egregious misjoinder amounts to fraudulent joinder. ***Cal. Truck***, 24 F. App'x. at 729. The Court held that joinder "was not so improper as to be considered egregious," where all plaintiffs, diverse and non-diverse, brought claims involving the same defective product from a defendant manufacturer. *Id.* at 730. Thus, ***Tapscott*** was inapplicable.

The Ninth Circuit easily could have reached a similar conclusion here. Assuming, as the Petitioners do, that Plaintiffs were misjoined, it is entirely possible that the Ninth Circuit concluded that misjoinder was not so egregious as to be fraudulent because all of the Anderson Plaintiffs' claims involved the same defective product – PPA – produced by a defendant manufacturer and sold be a defendant retailer. Such a holding would be wholly consistent with the Court's statement that neither the record nor the law supported severing the Plaintiffs whose claims destroyed diversity. Pet. for Cert. App. A.

2. The Ninth Circuit's decision is distinguishable from *Tapscott* on grounds very similar to those the Eleventh Circuit enunciated shortly after deciding *Tapscott*.

Two years after the *Tapscott* decision, the Eleventh Circuit distinguished *Tapscott* on the ground that it involved "two distinct classes that ha[d] 'no real connection' to each other." *Triggs v. John Crump Toyota*, at 1286. As *Triggs* makes clear, *Tapscott* is readily distinguishable from this case, which is not a class action and does not join separate classes of plaintiffs with claims based on different products. Rather this case involves a joint complaint, in which each plaintiff claims similar physical injuries resulting from the consumption of cold medications containing the same injury-causing drug: PPA.

As in *Triggs*, the Anderson Plaintiffs' claims arise out of similar transactions and raise "common questions of law and fact." 154 F.3d at 1290. Each Anderson Plaintiff claimed that they suffered similar physical injuries caused by ingesting PPA. Each Plaintiff alleged that they came in contact with PPA through over-the-counter cold medications. The Plaintiffs asserted claims against the manufacturers of the particular cold medications they consumed, and against the retailers from whom they purchased the medications. There

is a "real connection" between these claims, and ***Tapscott*** is inapplicable. *Id.*

3. The Fifth Circuit does not add to the "split" that the Petitioners allege.

Contrary to the Petitioners' claim, ***Benjamin Moore***, 318 F.3d at 630-31, does not add to the alleged split in the Circuits. Pet. for Cert. at 9. The Petitioners concede, as they must, that the Fifth Circuit did not actually apply ***Tapscott*** in ***Benjamin Moore***. *Id.* Rather, the Court expressly declined to apply ***Tapscott***, and clarified that it was not rejecting the ***Tapscott*** rationale (318 F.3d 630-31):

> Thus, without detracting from the force of the ***Tapscott*** principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction, we do not reach its application in this case.

At most, ***Benjamin Moore*** makes the Fifth Circuit the first and only Circuit to indicate agreement with ***Tapscott*** in a published opinion. Of course, this indicates consensus, not a split. The Petitioners suggest that the Ninth Circuit has also indicated agreement with ***Tapscott***, in the unpublished decision ***California Dump Truck***, discussed above. Pet. for Cert. at 11. So at most, two Circuits have expressed agreement with ***Tapscott***, and none have expressed disagreement. The Ninth Circuit opinion, which does not even address ***Tapscott***, misjoinder, or egregious misjoinder amounting to fraud, does nothing to upset the agreement in these decisions.

CONCLUSION

For the reasons stated above, the Anderson Plaintiffs respectfully ask the Court to deny the Petition for Certiorari.

Respectfully Submitted,

WIGGINS & MASTERS, P.L.L.C.

Charles K. Wiggins, WSBA 6948
Counsel of Record
Shelby R. Frost Lemmel, WSBA 33099
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

LEVIN PAPANTONIO MITCHELL
ECHSNER & PROCTOR, P.A.

Timothy M. O'Brien, FL Bar 055565
P.O. Box 12308
Pensacola, FL 31591
(850) 435-7000

Counsel for Respondents